whether the Ordinance would fail to substantially advance any of its stated purposes.

On January 25, 2000, the District Court dismissed Parkowners' damages claims as unripe. *See* Pet. App. D-1.

On March 31, 2000, Parkowners filed a motion for summary judgment. Parkowners adduced no evidence in support of their motion. Instead, Parkowners merely argued that the Ordinance would presumptively create a premium and therefore was invalid as a matter of law pursuant to the Ninth Circuit decision in *Richardson v. City and County of Honolulu* ("*Richardson*"), 124 F. 3d 1150 (9th Cir. 1997), *cert. denied*, 525 U.S. 871 (1998), because the presumptive premium would prevent the Ordinance from substantially advancing an unstated purpose of preserving affordable housing.

On April 21, 2000, City filed its Opposition to the summary judgment motion. City argued: (1) Parkowners had failed to adduce any evidence that the Ordinance would produce any premium of any magnitude; (2) the Ordinance had no stated purpose of preserving affordable housing; (3) Parkowners completely failed to address whether the Ordinance would further its seven stated purposes; and, (4) Parkowners' facial claim was barred by the one-year statute of limitations because the Ordinance continued in force the same vacancy control as its predecessor rent control ordinance enacted in 1979. City also filed opposing Declarations of Ken Baar, Stephen D. Lewis, and Jeffrey A. Walter. *See* Pet. App. F-30 and F-31.

Mr. Walter had been Cotati's City Attorney since 1980. His declaration adduced facts showing that Parkowners' facial claims were time-barred because Parkowners had

continuously been subject to rent control, including vacancy control, since 1979.

Dr. Lewis' declaration adduced evidence that: he had conducted analyses, including a regression analysis, of 1700 mobilehome sales in Sonoma County from 1987-89; and, his analyses concluded that City's Ordinance was not adding any premium to mobilehome resale prices. *See* Pet. App. F-30.

Dr. Baar's declaration adduced evidence of a study he had done for the City of Montclair. His study concluded that even if vacancy control were to add a premium to mobilehome resale prices under Montclair's mobilehome rent control ordinance, mobilehomes would still be more affordable with vacancy control than without it. *See* Pet. App. F-31.

On June 21, 2000, the Court granted Parkowners' summary judgment motion. *See* Pet. App. D-1. The Court noted that Parkowners had adduced no evidence in support of their motion (*see* Pet. App. H-14), but as it later noted in its subsequent Order stating its inclination to vacate the judgment, it felt that this Court's holding in *Richardson*, *supra*, compelled invalidation of the Ordinance as a matter of law, without any factual analysis. For that reason, the Court ignored City's proffered evidence in the Declarations of Lewis and Baar. *See* Pet. App. H-17. The Court disregarded City's statute of limitations defense on the grounds the challenged Ordinance was a different ordinance from the predecessor ordinance. *Id.* at H-9. The Court failed to address the fact that Parkowners' contentions as to the effects of vacancy control were the same under both ordinances. The Court also failed to address the facts that: the Ordinance had no stated purpose of

preserving affordable housing; and, Parkowners had failed to address the Ordinance's seven stated purposes. On June 21, 2000, the Court entered its Judgment declaring the Ordinance invalid. *Id* at 70.

On July 3, 2000, City filed a Motion to Amend or Alter the Judgment. In it City argued, inter alia, that the Court should not have declared the entire Ordinance invalid; instead, the Court at most should have invalidated only the challenged vacancy control provisions. The Court granted City's motion on August 25, 2000 and entered an Amended Judgment declaring only section 19.14.150 of the Ordinance to be void. *See* Pet. App. F-6.

On September 13, 2000, the Ninth Circuit issued its decision in *Chevron U.S.A., Inc. v. Cayetano* ("*Chevron*"), 224 F. 3d 1030 (9th Cir. 2000), *cert. denied*, 532 U.S. 942 (2001). There, the Court addressed the contention that an ordinance's rent increase restrictions on gasoline station franchises would cause higher gasoline prices and thus frustrate the ordinance's purpose of ameliorating rising gasoline prices. The Court clarified its holding in *Richardson*, *supra*, noting that the mere possibility that an ordinance might produce a price increase or premium was not sufficient to constitute a taking. Instead the plaintiff had the burden of proving as a matter of predictive fact that the challenged ordinance would produce a premium that would prevent it from substantially advancing a legitimate government purpose.

On or about September 19, 2000, City filed a Notice of Appeal from the Amended Judgment; Parkowners filed their Notice of Cross-Appeal on October 4, 2000.

On November 16, 2000, City filed a Motion for Memorandum Opinion Stating Inclination To Grant Relief From

Amended Judgment Pursuant To F.R.C.P. Rule 60. In it City argued that in light of the Ninth Circuit's decision in *Chevron*, *supra*, the District Court had erred in granting summary judgment as a matter of law. *Id.* On January 18, 2001, the District Court filed its Memorandum Decision and Order granting City's Motion. *See* Pet. App. D-2.

On February 28, 2001, the Ninth Circuit remanded the appeal to provide the District Court an opportunity to vacate its Amended Judgment. *See* Pet. App. D-2. The District Court filed its Order on March 7, 2001, vacating its Amended Judgment. On April 13, 2001, the Ninth Circuit dismissed the appeal and cross-appeal as moot. *See* Pet. App. F-7.

The District Court thereafter set the matter for trial. On September 10, 2002, following a bench trial, the District Court filed its Findings Of Fact And Conclusions Of Law. *See* Pet. App. D. The Court found the following facts: (1) The Ordinance did not create, nor was it likely to create, a premium in mobilehome resale prices; (2) the Ordinance did not inhibit, nor was it likely to inhibit, the sales of mobilehomes or the construction of new mobilehome parks; (3) the Ordinance substantially advanced its stated purposes; (4) the Ordinance did not affect, nor was it likely to adversely affect, the existence of affordable housing in Cotati; and, (5) Cotati had enforced its predecessor rent control ordinance consistent with the understanding that it provided for vacancy control. *Id.* at D-2 through D-26.

The Court additionally made the following conclusions of law: (1) The Ordinance's stated purposes are legitimate government interests; (2) the Ordinance has the additional unstated legitimate government purpose of preserving

affordable housing; (3) Parkowners failed to establish that the Ordinance fails to substantially advance legitimate government interests; (4) the Ordinance does not violate the Fifth and Fourteenth Amendments to the United States Constitution because it does not constitute a facial regulatory taking; and, (5) Parkowners' facial challenge is barred by the statute of limitations. *Id.* at D-26 through D-33

The Court filed Judgment in City's favor on September 10, 2002, and Parkowners appealed.

On July 15, 2004, the Ninth Circuit issued its initial opinion. Pet. App. F-1. In it, a two-justice majority panel reversed. The panel reinstated the original summary judgment in favor of Parkowners holding that as a matter of law the Ordinance presumptively created a premium (even though factually it did not), which premium presumptively prevented the Ordinance from substantially furthering City's interests, "including that of affordable housing." *See* Pet. App. F-22. The panel could not and did not explain how the mythical premium prevented the Ordinance from substantially furthering its seven stated purposes which were unrelated to preserving affordability of homes as to future residents.

City filed a timely Petition For Panel Rehearing And Rehearing En Banc. After City filed its petition, this Court granted certiorari in *Lingle v. Chevron U.S.A., Inc.* ("*Lingle*"), 544 U.S. ___, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005). There, the Court held that an ordinance's failure to substantially advance a legitimate public purpose was not part of our takings jurisprudence. Based on *Lingle*, the Ninth Circuit vacated its initial decision and affirmed the District Court's judgment in City's favor. Pet. App. B-1.

REASONS WHY THE PETITION SHOULD BE DENIED

Parkowners fail to offer any of the reasons listed in Supreme Court Rule 10 that would merit the granting of its petition. The Ninth Circuit's decision does not conflict with the decisions of any other circuit or state court of the last resort.

Contrary to Parkowners' suggestion in their "Questions Presented," this Court in *Lingle* did not hold that a "'substantially advances a legitimate state interest' test . . . is limited to a due process claim." *See* Petition at I. Instead, this Court iterated that government action can be found impermissible where it "is so arbitrary as to violate due process. . . ." *Lingle*, *supra*, 161 L. Ed. 2d at 28. This Court previously has held that rent control does not violate due process because it is rationally related to the legitimate government purpose of "protecting tenants from burdensome rent increases while at the same time ensuring that landlords are guaranteed a fair return on their investment." *Pennell v. City of San Jose* ("*Pennell*"), 485 U.S. 1, 13 (1988). The Ninth Circuit is in accord. *See Levald, Inc. v. City of Palm Desert* ("*Levald*"), 998 F. 2d 680, 690 (9th Cir. 1993), *cert. denied*, 510 U.S. 1093 (1994).

Here, Parkowners were not prevented by Ninth Circuit precedent from alleging a due process claim; they simply could not do so on the merits because City's Ordinance is rationally related to a legitimate government purpose. Moreover, City in any event met a much higher standard by proving at trial that the Ordinance substantially advanced a number of legitimate government purposes. Petitioners do not urge any error in that trial. The correction of any such

error would in any event be beyond the paramount roles of this Court.

The Court should also reject Parkowners' implicit suggestion that it overturn *Pennell* and *Lingle*, *supra*, and apply the heightened scrutiny of *Nollan v. California Coastal Comm'n* ("*Nollan*"), 483 U.S. 825 (1987). In *Nollan*, the Court noted that because of the potential dangers of a disguised physical taking, the conditioning of a land use permit on the exaction of an easement should be subjected to a higher level of means-ends scrutiny. In *Lingle*, however, the Court correctly noted the dangers of extending such heightened scrutiny to rent control and other land use restrictions:

> The [substantially advances] formula can be read to demand heightened means-ends review of virtually any regulation of private property. If so interpreted, it would require courts to scrutinize the efficacy of a vast array of state and federal regulations – a task for which courts are not well suited. Moreover, it would empower – and might often require – courts to substitute their predictive judgments for those of elected legislatures and expert agencies.

161 L. Ed. 2d at 892.

I.

CERTIORARI IS NOT MERITED UNDER RULES OF THE SUPREME COURT, RULE 10

Supreme Court Rule 10 emphasizes that certiorari "will be granted only for compelling reasons" and states non-exhaustive circumstances under which certiorari

might be appropriate. Parkowners allege no such circumstance here; nor do they offer any compelling reason for granting certiorari.

At trial, City successfully defeated on the merits Parkowners' claim that the Ordinance failed to substantially advance any legitimate public purpose. This Court's decision in *Lingle* simply confirmed that not only did Parkowners' contention lack factual merit, but it also lacked any legal merit.

II.

PARKOWNERS DO NOT HAVE A VIABLE SUBSTANTIVE DUE PROCESS CLAIM

Parkowners request that they be allowed to belatedly assert a substantive due process claim based on their allegation the Ordinance substantially fails to advance any legitimate government purpose. This request makes no sense. First, contrary to Parkowners' contention (Pet. at 14), this Court did not approve a "substantially advances" substantive due process test in *Lingle*. To the contrary, the Court affirmed that substantive due process requires only a rational (non-arbitrary) relationship to a legitimate public purpose. *Lingle*, *supra*, 161 L. Ed. 2d at 891 and 882 ("[W]e have long eschewed such heightened scrutiny when addressing substantive due process challenges to government regulations"). On its face, the Ordinance does not violate due process because it is rationally related to the legitimate government purpose of "protecting tenants from burdensome rent increases while at the same time ensuring that landlords are guaranteed a fair return on their investment." *Pennell*, *supra*, 485 U.S. at 13. The Ninth Circuit agrees. *See Levald*, *supra*, 998 F. 2d at 690.

Second, City in any event factually disproved at trial Parkowners' contention that the Ordinance failed to substantially advance any legitimate government purpose.

III.

PARKOWNERS DO NOT HAVE A VIABLE TAKINGS CLAIM UNDER *NOLLAN*

Parkowners argue that their failure-to-substantially-advance takings claim should be analyzed under *Nollan*, not *Lingle*. Parkowners' argument is meritless. The allegations here are identical to those in *Lingle*: a rent control ordinance that allegedly will not accomplish its purposes. This is not a case, as in *Nollan*, wherein the City exacted any physical dedication of property.

In *Nollan*, the California Coastal Commission conditioned the development of beachfront property on the dedication of a public easement across it. It was this exaction of an easement, which constituted a physical taking, that prompted this Court to impose the heightened scrutiny of the "substantially advances" test:

> We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement rather than the state police power objection.

Nollan, supra, 483 U.S. at 841.

Parkowners' challenge herein to City's Ordinance is virtually indistinguishable from the challenge to the Hawaiian Act in *Lingle*. Both challenges asserted that rent

control restrictions effected facial regulatory takings because they did not substantially advance a legitimate purpose. Both challenges concerned themselves not with the impact of the restrictions on the regulated property, but instead focused solely on whether the restrictions would achieve their goals. As this Court therefore noted in *Lingle*, *supra*, 161 L. Ed. 2d at 893-94:

> Although *Nollan* and *Dolan* quoted *Agins'* language, see *Dolan*, *supra*, 512 U.S. at 385, 129 L. Ed. 2d 304, 114 S. Ct. 2309; *Nollan*, *supra*, 483 U.S. at 834, 97 L. Ed. 2d 677, 107 S. Ct. 3141, the rule those decisions established is entirely distinct from the "substantially advances" test we address today. Whereas the "substantially advances" inquiry before us now is unconcerned with the degree or type of burden a regulation places upon property, *Nollan* and *Dolan* both involved dedications of property so onerous that, outside the exactions context, they would be deemed *per se* physical takings. In neither case did the Court question whether the exaction would substantially advance *some* legitimate state interest. See *Dollan*, *supra*, 512 U.S. at 387-388, 129 L. Ed. 2d 304, 114 S. Ct. 2309; *Nollan*, *supra*, 483 U.S. at 841, 97 L. Ed. 2d 677, 107 S. Ct. 3141. Rather, the issue was whether the exactions substantially advanced the *same* interests that land-use authorities asserted would allow them to deny the permit altogether. As the Court explained in *Dolan*, these cases involve a special application of the "doctrine of 'unconstitutional conditions,'" which provides that "the government may not require a person to give up a constitutional right – here the right to receive just compensation when property is taking for a public use – in exchange for a discretionary benefit

> conferred by the government where the benefit has little or no relationship to the property." 512 U.S. at 385, 129 L. Ed. 2d 304, 114 S. Ct. 2309. That is worlds apart from a rule that says a regulation affecting property constitutes a taking on its face solely because it does not substantially advance a legitimate government interest. In short, *Nollan* and *Dolan* cannot be characterized as applying the "substantially advances" test we address today, and our decision should not be read to disturb these precedents.

In short, *Lingle* made it clear that the *Nollan* test has no application in a rate-setting case like this one.

IV.

THE COURT SHOULD NOT EXPAND APPLICATION OF THE HEIGHTENED SCRUTINY OF *NOLLAN* BEYOND THOSE CASES INVOLVING PHYSICAL EXACTIONS

In *Lingle*, the Court found it "remarkable, to say the least," (161 L. Ed. 2d at 892) that a District Court Judge could put a legislative act on trial, receive evidence on whether it would achieve its purposes, and then substitute his opinion for that of the legislature as to whether the act was efficacious. The situation in this case is even more remarkable.

Here, City prevailed after trial, proving that the Ordinance: never had produced any so-called premium and was unlikely to do so in the future (*see* Pet. App. D-10, ¶ 13); and, the Ordinance substantially advanced its stated legitimate government purposes. *Id.* at D-29, D-30 and D-31.

In its initial decision reversing the District Court, the Ninth Circuit panel majority ignored the trial court and reinstated summary judgment in favor of Parkowner. In so doing, the panel majority presumed the Ordinance unconstitutional based solely on an unproven economic theory published in a law review by UCLA economics professor Dr. Hirsch. This is the same Dr. Hirsch who testified as an expert at trial for Parkowners, and whose testimony was found unpersuasive by the District Court (Pet. App. D-17, ¶ 14a) and afforded little weight. *Id.* at D-12, ¶ 13c.

After embracing an economic theory that was factually disproven at trial, the Ninth Circuit invalidated the Ordinance for not advancing an unstated purpose of preserving affordable housing, while ignoring the fact that the mythical premium would not vitiate the Ordinance's seven stated purposes.

In short, with the application of heightened scrutiny, a Ninth Circuit panel majority effectively repealed City's Ordinance simply because it did not think it would work. This arrogation of legislative power highlights the evil that would be created by extending *Nollan's* heightened scrutiny to settings beyond the limited cases involving exactions or unconstitutional conditions.

CONCLUSION

Parkowners neither cite Supreme Court Rule 10, nor offer any of the reasons listed in it that would justify the grant of certiorari. In dissenting from the panel majority's original decision, Judge Fletcher noted that the Ninth Circuit using *dicta* in *Yee v. City of Escondido*, 503 U.S. 519 (1992), had crafted a takings theory that was unique to the

Ninth Circuit (Pet. App. F-35 and F-36), and which returned the Circuit to the *Lochner* [*v. People of State of New York*, 198 U.S. 45 (1905)] era when courts would second-guess legislative wisdom in enacting economic regulations. The Ninth Circuit's Order granting rehearing merely puts the Circuit back in step with this Court's decisions and the rest of the country. This Court should not grant certiorari.

DATED: January, 2006.

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In the

Supreme Court of the United States

GENE CASHMAN and EUGENIA GUINN,

Petitioners,

v.

CITY OF COTATI,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court, in *Lingle v. Chevron U.S.A. Inc.*, 125 S. Ct. 2074 (2005), held that a "substantially advances a legitimate state interest" test requiring courts to decide whether an ordinance furthers its objectives is not a stand alone takings test. This sort of means-ends analysis is limited to a due process claim.

Petitioners brought a takings claim under another form of the substantially advances test—one that requires a close connection between the effect of an ordinance and the objective sought to be achieved by a regulatory constraint. This is the cause-effect test applied in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

1. Does this Court's decision in *Lingle v. Chevron* preclude an independent substantially advances takings claim that requires courts to decide whether there is a close connection between the effect of a regulation and the objective sought to be achieved by a regulatory constraint?

2. Should Petitioners' pre-*Lingle* substantially advances takings claim be decided under a due process analysis post-*Lingle*, where Circuit Court precedent prohibited Petitioners from bringing a due process claim?

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REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioners Gene Cashman and Eugenia Guinn respectfully file this reply to the opposition to Petition for Writ of Certiorari (Opp.).

I

THIS COURT'S DECISION IN *LINGLE v. CHEVRON U.S.A. INC.* CREATED IMPORTANT CONSTITUTIONAL QUESTIONS THAT SHOULD BE RESOLVED BY THIS COURT

Respondent City of Cotati argues that Petitioners do not raise an issue appropriate for resolution by this Court. Opp. at 13-14. That argument ignores the important questions of federal regulatory takings law that arose in Petitioners' case after this Court's decision in *Lingle v. Chevron U.S.A. Inc.*, 125 S. Ct. 2074 (2005). In *Lingle*, this Court repudiated a means-ends substantial advancement analysis as a Takings test. *Id.* at 2083-84. This Court did not address the viability of, or even mention, the cause-effect substantial advancement analysis presented in Petitioners' case. Yet, the Ninth Circuit Court of Appeals relied on the *Lingle* decision to withdraw its judgment for Petitioners. Appendix B-1.

Only this Court can clarify whether a cause-effect test—unrelated to the *Lingle* ends-means test—is properly an independent Takings test. The cause-effect test advanced by Petitioners requires a close connection between the effect of an ordinance—here, the transfer of an interest in property—and the objectives sought to be achieved by the rent control ordinance. *See* Petition for Writ of Certiorari (Petition) at 9-11. This test, whether or not properly characterized as a substantially advances test, is not the test analyzed in *Lingle*. Cotati agrees, complaining in several spots that Petitioners did

not seek to prove, or in fact prove, a *Lingle*-type means-ends substantial advancement test. *See, e.g.*, Opp. at 7.[1] The fact is that evidence regarding the effectiveness or ineffectiveness of Cotati's rent control ordinance in "protect[ing] mobilehome park residents from excessive space rents, while guaranteeing parkowners a fair, just and reasonable return" (Opp. at 4) is irrelevant to the Takings claim advanced by Petitioners.

Cotati is wrong when it says that Petitioners' case is indistinguishable from the challenge to Hawaii's ordinance in *Lingle*. Opp. at 15-16. In their facial challenge to Cotati's rent control ordinance, Petitioners successfully argued that the ordinance creates a situation where universal economic principles establish that property will be transferred from the park owners to their tenants. *See Cashman v. City of Cotati*, 374 F.3d 887, 899 (9th Cir. 2004). Unlike the property owner in *Lingle*, Petitioners did not present experts to offer opinions on whether the ordinance would fulfill its purposes. In this case, expert testimony was utilized by Petitioners for the limited purpose of establishing the economic principle that provides for the likelihood of a wealth transfer. *See Cashman v. Cotati*, 374 F.3d at 899. In fact, the economic principle upon which Petitioners relied is so widely recognized and well-established, that the Ninth Circuit Court would not even require expert testimony on this point. *Id.*

Once the economic principle was established, the court only needed to look to the ordinance's general scope and dominant features, and not to the effect of the application of the ordinance in specific circumstances. *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 487 n.16 (1987) (A court must determine the true nature and effect of a regulation

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[1] Throughout the long course of this litigation, Cotati has used the words "substantially advances a legitimate state interest" to describe an ends-means analysis. Cotati continues to do so in its opposition brief.

by "examin[ing] the operative provisions of a statute, not just its stated purpose."). *See also Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413-14 (1922). And if the true nature or effect of an ordinance is to facilitate the transfer of private property without compensation, the essential nexus or cause-and-effect relationship required by takings law is absent—regardless of whether the measure will or will not achieve any of its stated objectives (such as controlling rents). In this case, the ordinance created a wealth transfer, and that wealth transfer does not advance any legitimate government interest.

The cause-effect test argued by Petitioners, like the Takings tests endorsed in *Lingle*, focuses on the "*magnitude or character of the burden* a particular regulation imposes upon private property rights." *Lingle*, 125 S. Ct. at 2084. Cotati argues otherwise. Opp. at 16. But the cause-effect test, like the Takings Clause, "does not concern itself with the underlying legitimacy of the governmental action—which is presupposed in a takings challenge—but rather, examines whether fairness requires compensating a property owner because the nature of the regulatory taking is 'functionally comparable to government appropriation or invasion of private property.'" *The Supreme Court, 2004 Term; Regulatory Takings–"Substantially Advances" Test*, 119 Harv. L. Rev. 297, 301 (2005) (footnote omitted).

The substantially advances test, formulated as a means-ends test, conflated due process and takings and allowed the courts to second-guess legislative action. Steven J. Eagle, Professor of Law at George Mason University in Virginia, wrote that "[t]he problem highlighted by *Lingle*, then, is not that the 'substantially advances' test is a bad one, but that clarity in takings jurisprudence would be greatly enhanced by one more attuned to traditional property law concepts." Steven J. Eagle, Lingle v. Chevron *and Its Effect on Regulatory Takings*, SL012 ALI-ABA 167, 170 (2005).

The test advanced by Petitioners creates none of the problems inherent in an ends-means analysis, and fits clearly within the Takings theory endorsed in *Lingle*. *Lingle* is but one step in the process of developing a coherent body of takings jurisprudence; this case provides an opportunity for the Court to come one step closer to that goal. Review is necessary to provide a clear statement that *Lingle* did not affect the validity of the cause-effect Takings test argued by Petitioners.

II

IF THE NINTH CIRCUIT COURT'S PRE-*LINGLE* JUDGMENT FOR PETITIONERS IS NOT REINSTATED, PETITIONERS SHOULD BE ALLOWED TO PROVE THEIR CASE UNDER A DUE PROCESS THEORY

Cotati claims that Ninth Circuit precedent did not prevent the park owners from alleging a due process violation but, rather, park owners could not allege such a violation because rent control is rationally related to a legitimate government purpose. Opp. at 12. Cotati's statement emphasizes the need for this Court to resolve (or remand the case so that a lower court can resolve) questions raised by the circumstances of this case. These are questions not addressed in *Lingle*.[2]

More than six years ago, Petitioners filed the lawsuit in this case. They plead a takings claim, but were precluded from bringing a substantive due process claim instead of, or in addition to, the takings claim. In *Armendariz v. Penman*, 75 F.3d 1311, 1325-26 (9th Cir. 1996), the Ninth Circuit Court

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[2] Cotati misrepresents the due process claim presented by the facts of this case. Property owners do not claim that rent control, in and of itself, violates due process. This case raises the question whether due process is violated by the effect of Cotati's rent control ordinance—to compel the transfer of a valuable property interest from the park owners to their tenants.

held that "[s]ubstantive due process analysis has no place in contexts already addressed by explicit textual provisions of constitutional protection, regardless of whether the plaintiff's potential claims under those amendments have merit." *See Weinberg v. Whatcom County*, 241 F.3d 746, 749 n.1 (9th Cir. 2001); *Buckles v. King County*, 191 F.3d 1127, 1137 (9th Cir. 1999). The Takings Clause provides an explicit textual provision that subsumes any due process claims in land use cases. *Macri v. King County*, 126 F.3d 1125, 1129 (9th Cir. 1997).

The *Armendariz* line of cases cannot control in cases where a substantial advancement Takings claim is no longer recognized. Petitioners should be allowed to prove a due process claim, if *Lingle* precludes their cause-effect takings claim.

Cotati's predictions of Petitioners' chances of success on a substantive due process claim are without merit (Opp. at 14), because the standard of review applied to a substantive due process claim involving the deprivation of a property interest after *Lingle* is uncertain. Cotati cites *Lingle* for application of a standard that decides whether government action is "so arbitrary as to violate due process." Opp. at 12. Although the Ninth Circuit Court applied an arbitrary and capricious standard ten years ago when it still entertained substantive due process claims, it is not possible to know what standard that court would apply today under the new, post-*Lingle* formulation of property rights issues as due process claims. As Professor Eagle correctly notes, "[t]he adoption of some form of heightened scrutiny in property deprivation cases would go a long way towards placing property rights on a par with other individual rights." Eagle, *supra*, at 184.

These are all issues that raise important federal questions that can be examined if Petitioners are given the chance to litigate a due process claim.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the Petition, the Petition for Writ of Certiorari should be granted.

DATED: February, 2006.

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